Nos. 14469 - 14470

In The
United States Court of Appeals
For the Ninth Circuit

JOHN K. BORG,
Appellant,
vs.
LOUIS A. BOAS and THE NEWS-REVIEW PUBLISHING COMPANY, INC., a Corporation,
Appellees,
No. 14469

and

JOHN K. BORG,
Appellant,
vs.
THE TRIBUNE PUBLISHING COMPANY, a Corporation,
Appellee.
No. 14470

Appeal from the United States District Court
for the District of Idaho
Central Division

Honorable Chase A. Clark
United States District Judge

BRIEF OF APPELLEES

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CONSTITUTIONAL PROVISIONS

OTHER CITATIONS

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BRIEF OF APPELLEES

STATEMENT OF THE CASES

Under rule 18 subdivision 3, appellant's statement of the case is controverted and will hereinafter be specifically commented upon. Appellees' statement is as follows:

ISSUES

Each of the two cases was instituted by appellant, one against the appellee newspaper, Tribune Publishing Company, and T. C. Thomas, and the other against the appellee newspaper, The News-Review Publishing Company, its editor, Louis A. Boas, and T. C. Thomas, to recover damages

for publishing, on May 13, 1953, articles (plaintiff's Exhibits 1 and 6) reporting a speech made by T. C. Thomas on May 12, 1953 at a public meeting in Moscow, Idaho.

Appellees defended on the grounds that the words spoken and published were just and fair reports of a matter of public interest and concern and that said words were spoken and published for the public benefit and were, therefore, privileged, and that said articles were true in substance and in fact.*

The cases were consolidated for trial.

Prior to the trial, T. C. Thomas was, on his motion, dismissed from the action herein numbered 14470 (R. 27). At the conclusion of appellant's evidence, T. C. Thomas was, upon his motion, dismissed from the action herein numbered 14469 (R. 150).

No appeal was taken from said dismissals and T. C. Thomas is not a party to these appeals.

At the conclusion of appellant's (plaintiff's) evidence, the appellees (defendants), other than Thomas, renewed motions to dismiss, made before trial, which had then been denied without prejudice to renewal at trial. (R. 149). The same were overruled again, without prejudice (R. 151). After all the evidence had been submitted, the appellees again renewed their motions to dismiss and, in addition, moved for a directed verdict in favor of the appellees (R. 286).

The jury was instructed to (R. 292) and did return a verdict in favor of appellees (R. 17 and 19) and judgments were

*The complete articles are set forth in the appendix and appear in the printed record in Case No. 14469 at pages 15 and 16 and in Case No. 14470 at pages 17 and 18.

entered accordingly, (R. 17 and 19) from which these appeals are taken.

FACTS

On and prior to December 14, 1952, the above mentioned defendant, T. C. Thomas, was a Captain in the United States Navy and Commanding Officer of the Naval Reserve Officers Training Corps at Moscow, Idaho. One Richard Shoup was enrolled as a midshipman member.

On the aforesaid date, Shoup became involved in an altercation and combat with one Murray Estes, a lawyer in Moscow, Idaho, and former prosecuting attorney of Latah County, Idaho. The altercation took place in a public business establishment operated by E. G. Greene. Estes struck Shoup in the face with his fist, jabbed a gun into the ribs of E. G. Greene, and threatened to shoot and kill Shoup (Exhibit 23, pages 3, 4, 5, 15, 16, 17, 18, and 30). No arrest was made at the time. Estes' accosting Shoup was a case of mistaken identity. (Exhibit 23).

On January 12, 1953, and within thirty minutes of the time the incoming Prosecuting Attorney and Probate Judge of Latah County, Idaho, were sworn in for their first terms of office (R. 64, 80), Estes was charged in the Probate Court of said Latah County with the crime of: "Assault with a Deadly Weapon – a Felony" upon Richard Shoup (Exhibits 7, 13, 14, and 22) (R. 50, 51). No warrant of arrest was issued (R. 63) and he was released on his recognizance (R. 50). On the same afternoon, Attorney Lawrence Huff, friend and attorney for Estes, called upon the Prosecuting Attorney, suggested a dismissal (R. 155) and continued to press for

same with meetings and preparation of formal motions (R. 155, 156, 157, 158, 161, and 193).

On January 14, 1953, the Probate Judge disqualified himself and the case was transferred to the Justice Court of appellant, John K. Borg. Late that afternoon, appellant and prosecuting attorney, Alsager, had a conference at the Elks Club (R. 52, 79, 88 and 89) in reference to the attendance of the prosecutor at the preliminary hearing which the Probate Judge had set for January 15, 1953 (R. 52, 163). The place for holding the preliminary hearing was not mentioned (Defendants' Exhibit 8) (R. 87 and 103). The prosecutor assumed the hearing would be held in the Police Station (R. 79 and 152) and arranged for the attendance of witnesses and a court reporter accordingly. He called appellant at eight o'clock on the morning of the 15th and told him he would be at the hearing at nine o'clock (R. 86, 89 and 165).

The telephone call by the prosecutor at eight o'clock on the morning of the 15th was not denied but admitted by appellant (R. 86, 89). Appellant had previously advised the prosecutor (on the afternoon of January 14, 1953) that so far as he was concerned, it would not be necessary for him (the prosecutor) to attend and that he (appellant) couldn't see why he should call him (R. 53) and that, "so far as I know, you don't have to be there, I don't know of any reason why I should tell you to be there" (R. 88). After advising the prosecutor not to attend, the appellant made no effort prior to the scheduled time for hearing to arrange for the attendance of the complaining witness or any other witness, the sheriff, former prosecuting attorney, or any person that

might know anything about the charge pending before him. He did not advise the complaining witness, or any other witness, that the case had been transferred into his Court or that he would hold a hearing of the charge in the Courtroom of the District Court of Latah County, instead of the Courtroom of the Probate Court or in the City Hall.

The prosecutor, the complaining witness, nine witnesses, and a Court Reporter were at the Police Station in the City Hall for the preliminary hearing at nine o'clock on the morning of the 15th (R. 165, 166, 167). At the same time, and unbeknown to the prosecutor, the appellant Justice of the Peace; Defendant Estes; Estes' attorney; Fred Cassin, a newspaper reporter; and others were at the District Courtroom in the Latah County Courthouse (R. 225).

Shortly after nine o'clock, the prosecutor, through the Police Matron, Peggy David, and the Latah County Sheriff's Office endeavored to and finally did contact the appellant (R. 218, 219, 221, and 222) and advised him that Mr. Alsager and his witnesses were at the Police Station waiting for him.

At seven minutes past nine o'clock, the appellant dismissed the criminal charges against Estes on motion of defendant's attorney because no evidence had been produced (Plaintiff's exhibit 7, defendants' exhibits 13, 14 and 22) (R. 50, 51, 86 and 227).

Prior thereto, appellant had made no attempt to contact the sheriff, prosecutor, or any other officer in regard to the matter (R. 86), although there were several telephones available had he been inclined to use them.

Immediately after the dismissal, appellant went to the Police Station, met the Prosecutor, advised him of the dismissal, but did not suggest any remedy therefor (R. 97, 98 and 100). The dismissal immediately aroused public criticism of which the appellant was conscious (R. 100, 101) and which continued to the date of the alleged defamatory publications (R. 104) to the extent that he addressed a letter to a Spokane, Washington, newspaper defending his action (Exhibit 8) (R. 102 and 103) in which he said:

> "This is the fact: In the first place, from what I know about Mr. Estes, I do not think he is the kind of man that took a gun around town without a reason and furthermore, I do not think there is a man, woman, or child in the town of Moscow who is afraid of going about their business or pleasures for fear of being molested by Mr. Estes. * * * *
>
> "Just why the Prosecuting Attorney, Mr. Alsager, and myself did not get together on the place of our holding the hearing, I do not know. Neglect on the part of both of us perhaps."

On January 17, 1953, Estes was charged by the prosecutor with the same crime of: "Assault with a Deadly Weapon" upon E. G. Greene in a Justice Court before Kent Power, Justice of the Peace. Judge Power was immediately disqualified by Estes and the case was transferred to appellant's court (Defendants' exhibits 15, 16 and 17) (R. 169, 170) who presided at the preliminary hearing held January 21, 1953 (Defendants' exhibit 23). The defendant, Estes, was represented by Lawrence H. Huff, (R. 172, 279 and 280) who had previously been instrumental in attempting to induce the prosecuting attorney to dismiss the first case against Estes.

Appellant dismissed the second charge against Estes (Defendants' exhibit 23, page 66) for insufficiency of the evidence (Defendants' exhibit 23, pages 3, 4, 5, 15, 16, 17, 18 and 30) (R. 172); (Defendants' exhibits 15, 16 and 17).

Matters abated officially until April 8, 1953, when Estes was charged with the crime of: "Battery" upon Richard Shoup, before Kent Power, Justice of the Peace (Defendants' exhibits 18, 19 and 20) (R. 173). Estes immediately disqualified Power and the case was transferred back to the Probate Court before the same Judge who had previously disqualified himself in the first case against Estes. (R. 50, 51). A plea of double jeopardy was made and denied and a Writ of Prohibition was applied for in the Supreme Court of Idaho (R. 175) after which Estes entered a plea of guilty and was fined $100.00 by the Probate Judge. The plea of guilty was accepted in private by the Probate Judge who did not call the prosecutor until after the case had been disposed of even though the case had been set for trial the next day. (R. 175, 176).

Two or three days after the filing of the battery charge, Estes charged Shoup in the Justice Court of Kent Power, with the crime of: "Attempt to Compound a Crime – a Felony" (Defendants' exhibit 21) (R. 173 and 239). This case was pending at the time the battery case was disposed of by plea. The case against Shoup was dismissed by the Prosecuting Attorney at the time it was set for trial at the County Courthouse. (R. 177). A number of people were attendant for the hearing in the Shoup case (R. 177) and, after its dismissal,

a meeting was held by them in the courthouse wherein the calling of a Grand Jury in connection with the Estes-Shoup affair was discussed (R. 178). Petitions for the calling of a Grand Jury were later filed with public officials (R. 179).

Beginning the latter part of January, 1953, Captain Thomas became concerned with the Estes-Shoup cases because Shoup was flunking out of school (R. 181). Thereafter he and Prosecutor Alsager conferred frequently about the course of events and the effect of them upon the midshipman student, Shoup (R. 179 and 180).

By May 12, 1953, public discussion and feeling were such that a public meeting was held in the High School in Moscow Idaho, which was attended by 150 or 200 citizens of Moscow and the immediate vicinity (R. 244, 245, 253.) Dean Jeffers a professor at the University of Idaho, presided at the meeting (R. 244, 254). The purpose of the meeting was to form a good government league (R. 254) and some persons were named to offices (R. 254). A number of people addressed the meeting (R. 255). About midway, Captain Thomas addressed the meeting. Al Barrackman and Ladd Hamilton reporters for the defendant newspapers, were present (R. 244 and 252). Each heard the address of Captain Thomas, who spoke from notes and did not read from a written manuscript (R. 246, 250, 259 and 260). Each reporter admitted writing the respective articles (Plaintiff's exhibits 1 and 6). Each admitted they wrote the quotations appearing therein in the exact words as they heard Captain Thomas speak them (R 246-250; 255-260). There was nothing in the articles other than the proceedings that transpired in the meeting (R. 248)

In action herein numbered 14469, the complaint alleges "that said article was false and untrue, particularly in the following respects":

> "Thomas then made reference to legal maneuvers in which a hearing was set for January 15 at 9 a. m. At 8 a. m. that day, Thomas explained, Alsager notified Judge John K. Borg that he would be ready at 9. Alsager and his witnesses were present at police court, normally the place where such hearings are held. But the Judge and Estes, Thomas said, had gone to the county courthouse to hear the case.
>
> " 'This was a ridiculous situation,' said Captain Thomas. A motion for dismissal was made and it was dismissed. 'If this had been an honest mistake, it could have been easily rectified by lifting a telephone and telling the prosecutor to bring his witnesses and come on over.'
>
> * * *
>
> "But these things, Thomas said, 'continued to disturb me':
>
> * * *
>
> "3. The extraordinary circumstances in which the first felony was dismissed.
>
> "4. Circumstances of the dismissal of the second charge against Estes.
>
> * * *
>
> "There is no way to get justice or to correct the faults in the administration of justice * * * without a grand jury,' Thomas concluded." (R. 5-6)

In action herein numbered 14470, the complaint alleged "that the article was false and untrue, particularly in the following respects":

"The meeting opened with a long and detailed review of the Estes-Shoup case by Capt. Thomas C. Thomas commander of the University Naval ROTC unit, of which Shoup was a member.

"Captain Thomas declared that 'I don't like the smell of it. I don't think we have here in this county now the proper administration of justice.'

* * *

"Estes went to the Perch, a campus restaurant, and there accosted Shoup with a pistol.

* * *

"Legal maneuvers had made it impossible for the prosecuting attorney to get a trial on that charge.

* * *

"At 9 a. m., he added the prosecuting attorney and witnesses and the court reporter appeared at the police court, normally the place where the hearing would be held. But the judge and Estes had gone in the meantime to the district courtroom to hear the case.

"This was a ridiculous situation,' Thomas said.

"Counsel for Estes moved that the case be dismissed and it was. If this had been an honest mistake, it could have been easily rectified simply by lifting a telephone and telling the prosecuting attorney to bring his witnesses and come on over.'

* * *

"But Thomas said these things disturbed him:

* * *

" 'The extraordinary circumstance of dismissing the first battery charge while the prosecutor was in the regular courtroom and the judge and defendant were in another;

" 'Circumstances of the dismissal of the second charge against Estes;

* * *

" 'What to do about it? There has been no change in the local setup since December. The same faces now hold office. The same thing could take place and again we'd go through the same rigamarole. There is no way to get justice or to correct the faults in the administration of justice in Latah County without a grand jury.' " (R. 5-6)

APPELLEES' COMMENT ON APPELLANT'S STATEMENT OF THE CASE

Appellees believe there are numerous statements contained in appellant's statement of the case that are not borne out by the record, however, many of these pertain to issues which they feel are not material to a determination of the case by this court. The following, however, appellees feel should be called to the attention of the court:

1. On page 8 of appellant's brief endeavor is made to infer that Mr. Lawrence Huff, later Mr. Estes' attorney, was consulted by Alsager, the prosecuting attorney, which discussion resulted in Alsager concluding, that he would make a motion for the dismissal of the complaint and absenting himself from the hearing. Mr. Huff testified:

> "A. I was the senior member of the bar at Moscow from a point of experience and age and Mr. Alsager, prior to that time, had consulted me frequently and asked my advice in regard to other matters in the law business. *At this time I interested myself in the matter because of the effect of this charge on the public and on the members of the bar and I went voluntarily to Mr. Alsager's office.*" (R. 276) (Emphasis ours)

He further testified that the motion for dismissal was typed in his office (R. 277) and accompanied Alsager to the probate judge's office to see that it was filed (R. 278). Huff also

prepared a second motion for dismissal after the probate judge had disqualified himself, changing the title of the court in which the action was pending to the justice court (R. 279). The only testimony concerning Alsager's intentions to appear in the action appears on page 279 of the record as follows:

> "Q. Did you have any conversation with him at the time that you presented the second motion for dismissal as to whether or not he was going to appear?
>
> "A. At that time he informed me that he wasn't going to make a motion for dismissal but he didn't intend to make any appearance in the action." (R 279)

Mr. Alsager's version of Mr. Huff's activities are as follows:

> "Q. Did Mr. Huff request you to sign this motion for dismissal?
>
> "A. Not only that, he persuaded me to sign it." (R. 193).

The remaining detailed facts concerning Mr. Huff's activities to secure a dismissal of the charge will be found on the pages of the record to-wit: (R. 154, 155, 156, 157, 158, 161).

2. On page 9 the statement is again made that "Mr. Alsager had changed his mind about attending the hearing * * *." Page 167 of the record is quoted to support this statement. No such evidence appears.

3. On page 9 the statement is made that the motion for dismissal of the first Estes complaint was granted "at about 9:25." Pages 54, 93, 94, 106 and 282-285 are cited in support of this statement. On none of the pages cited is the time of dismissal fixed at 9:25 or "about 9:25." The fixing of the

time of dismissal by witnesses for appellant appears on pages 168, 218-220 and 226, 227, of the record. Witness Cassin fixed the time at 9:07 (R. 226, 227). His testimony is corroborated by the testimony of witnesses David (R. 218-220) and Alsager (R. 168).

4. On page 9 the statement is made in connection with the meeting of May 12, 1953, that "T. C. Thomas was the chairman * * *." No reference to the record is made to support this statement. The evidence concerning the presiding officer at the meeting appears on pages 244 and 254 of the record.

5. Appellees believe the statement of facts contained in appellant's brief is wholly inadequate to present to the court a full, true and correct statement of the material facts the trial court had before it in deciding the case. The only statement contained in Appellant's Statement of the Case with reference to the manner in which the second and third criminal charges filed against Estes were maneuvered through the Courts and their ultimate disposition is contained in a single sentence on page 9 of the brief, reading: "Thereafter, other charges were filed against Mr. Estes, * * *." No reference is made to the felony charge made by Estes against Shoup. Appellant fails to detail the record of these other charges as if they had no bearing on the action of the Court in directing a verdict for the defendants.

In lieu of a factual statement, appellant has devoted one-half of his statement of the case (pages 12 to 22, inclusive) to statements made by the trial court that have no bearing on whether granting the motion for directed verdict in favor of the defendants was or was not proper.

ARGUMENT

Appellant's argument presents three general issues as follows:

1. The Court erred in holding the printed articles not libelous per se.

2. The defenses of qualified privilege and fair comment are not available if any statements of fact in the alleged libelous publications are false.

3. The Court erred in several respects in the admission or rejection of evidence.

Appellees will answer these issues as follows:

1. The defenses of qualified privilege and fair comment are available in this jurisdiction even though false statements of fact are contained in the alleged libelous publication.

2. The publications were privileged.

3. The alleged libelous matter was a fair comment on a matter of public concern, was published without malice, and appellees are not liable for its publication.

4. The alleged libelous matter was true.

5. If granting appellees' motion for directed verdict was correct, errors in the admission or rejection of evidence become immaterial and are not grounds for reversal.

THE DEFENSES OF PRIVILEGE AND FAIR COMMENT ARE AVAILABLE IN THIS JURISDICTION

I.

In urging that the defenses of privilege and fair comment are not available to the appellees in the instant action, appel-

lant assumes that the facts set forth in the alleged libelous articles are false. Nowhere has he pointed out what facts are false or upon what basis he claims them to be false. The question of truth or falsity of the facts stated in the alleged libelous articles will be discussed in another section of this brief. Appellees believe the rule to be that the defenses of privilege and fair comment are available in the jurisdiction from which this case arose, irrespective of whether there are false statements of facts contained in the alleged libelous article.

On page thirty-three of his brief, appellant says:

> "The rule of law is well settled in the Federal Courts and by the weight of authority in the State Courts that qualified privilege and fair comment as to public officers or others are not available as defenses, when, as in these cases, the newspaper articles are libelous per se and false."

Cited in support of the foregoing statement is Washington Times Co. vs. Bonner, (D. C.), 86 F. (2d) 836, 110 A.L.R. 393 and note 412, and other cases making similar holdings. There is no doubt that many courts, both State and Federal, have so held. On the other hand, many courts, both state and federal, and particularly the more recent decisions, take the view that the defenses are available, even if false statements of fact are made in the publication, if the false statements were honestly made in the belief that they were true, without actual malice and upon reasonable grounds for belief in the truth

thereof.* In Washington Times Co. v. Bonner, supra, the opinion refers to the doctrine there followed as being "the rule in the Federal Courts."† That case was decided in 1936. In 1938 the Supreme Court of the United States in Erie R. Co. v. Tompkins, 304 U. S. 64, held that the rule of law in the state in which the cause of action arose was controlling upon the federal courts in tort matters. It, therefore, follows that the trial court and this court are bound by the rule of law announced by the Supreme Court of Idaho. The rule in Idaho was established in Gough v. Tribune-Journal Co., 275 Pac. (2d) 663. The case involved publication of an open letter signed by certain taxpayers in Bannock County, Idaho, published in the local newspaper, criticizing certain actions of the Board of County Commissioners in connection with preparation of the county budget. In a unanimous opinion, the Supreme Court of Idaho quoted with approval, 3 A.L.I., Restatement of the Law of Torts, page 240 as follows:

"Occasions conditionally privileged afford a protec-

*The leading case adhering to the so-called minority rule is Coleman v. MacLennan (Kan.), 98 Pac. 281. Other decisions following the rule in the MacLennan case are:

Snively v. Record Pub. Co., (Cal.), 198 Pac. 1
Sylvester v. Armstrong, (Wyo.) 84 Pac. (2d) 729
Williams v. Standard-Examiner Pub. Co., (Utah), 27 Pac. (2d) 1
Griffin v. Opinion Pub. Co.. (Mont.), 138 Pac. (2d) 580
Emde v. San Joaquin etc. Council, (Cal.), 143 Pac. (2d) 20, 150 A.L.R. 916
Reynolds v. Arentz, (D.C. Nev.), 119 F. Supp. 82
Broking v. Phoenix Newspapers, Inc., 264 Pac. (2d) 413
Bailey v. Charleston Mail Assn., (W. Va.) 27 S.E. (2d) 837, 150 A.L.R. 348
Chesapeake Ferry Co. v. Hudgins, (Va.), 156 S.E. 429

†The rule stated in Washington Times v. Bonner, may now well be questioned as the rule in the courts of the District of Columbia in view of the more recent decisions in Sullivan v. Meyer, 141 Fed. (2d) 21, Potts v. Dies, 132 Fed. (2d) 734, and Sweeney v. Patterson, 128 Fed. (2d) 457. The remarks of the court refusing to follow in toto the rule in Washington Times v. Bonner are set forth in Appendix C.

tion based upon a public policy which recognizes that it is essential that true information shall be given whenever it is reasonably necessary for the protection of one's own interests, the interests of third persons, or certain interests of the public. In order that such information may be freely given, *it is necessary to afford protection against liability for misinformation given in an honest and reasonable effort to protect or advance the interest in question.*" (Emphasis ours.)

The decision in the Gough case is in accord with the authorities from all of the far western states and this Court, with the only exceptions being the States of Washington and Oregon.

The opinion in the Gough case also holds the defense of fair comment is proper, and that is the rule in this Court. In Golden North Airways, Inc., vs. Tanana Publishing Company, Inc., 9th Circuit Case No. 13415, (not yet reported), this Court, speaking through District Judge Yankwich, said:

"'The distinction between a statement with reference to private gossip and scandal and one concerning an act or conduct of public interest is so palpable as to require no elucidation. Consideration of peace and order between individuals calls for repression and punishment of false and defamatory statements of fact concerning the private person. There are equally cogent reasons for liberality of statement in matters of public concern. A citizen of a free state having an interest in the conduct of the affairs of his government should not be held to strict accountability for misstatement of fact, if he has tried to ascertain the truth and, on a reasonable basis, honestly and in good faith believes that the statements made by him are true.' Bailey v. Charleston Mail Ass'n, 1943, 126 W.Va.) 292, 306, 27 S.E. (2d) 837, 844

"In order to achieve this result, the comment must satisfy these conditions: (1) it must relate to a matter

of public interest; (2) it must relate not to a person but to his acts. Hence it must not contain imputations of corrupt or dishonorable motives on the persons whose conduct or work is criticized, save insofar as such imputations are warranted by facts; (3) it must be based on facts truly stated; (4) it must be the honest expression of the writer's real opinion on the facts which appear in the publication. *However, misstatements of facts are permissible in the view of the latest authorities.*" (Emphasis ours)

In his concurring opinion, Justice Pope said:

"At the argument counsel for appellant said, in answer to inquiries as to whether the article might not be fair comment, that such defense would not be available because here was a charge of a want of financial responsibility, that this was a statement of fact, not of opinion, and that fair comment cannot cover false statements of fact, citing Washington Times Co. v. Bonner, (C.A.D.C.) 86 Fed. 2d 836). It is true that there, in laying down the law for the District of Columbia, the court rejected the rule laid down in the leading case of Coleman v. MacLennan, 78 Kan. 711, 98 P. 281, that the right of fair comment extends, in the absence of malice, to misstatements of fact. But as Judge Yankwich says, the later, and I think the better considered authorities, disagree with the District of Columbia court. Thus in Snively v. Record Pub. Co., 185 Cal. 565, 198 P. 1, the California court, reversing its previous stand, expressly approved the Coleman v. MacLennan rule. I agree that even if we were to find that the article here did contain a statement of fact, yet we should hold that the rule to be applied in Alaska requires that the publication be regarded as fair comment."

It therefore appears that the rule in Idaho and the rule of this Court is that the defenses of conditional privilege and fair comment are available in this case, even if they were based upon misstatements of fact (which is denied in both

cases). The rule announced in the cases cited by appellant is not the law in this jurisdiction.

THE PUBLICATION WAS PRIVILEGED

It seems clear, from the authorities, that the occasion for the alleged libelous publications in these cases was a matter of public interest that would fall within the rule of conditional or qualified privilege, unless for some reason the privilege was lost. While perhaps each incident must be judged by itself, it is a general rule that the official or otherwise public activities of executive, legislative and judicial officers are matters of public interest and fall within the rule of qualified privilege. In Gough v. Tribune-Journal Co. (Ida.) 275 Pac. (2d) 663, the Idaho Supreme Court defined conditionally privileged occasions as:

> "Occasions conditionally privileged afford a protection based upon a public policy which recognizes that it is essential that true information shall be given whenever it is reasonably necessary for the protection of one's own interests, the interests of third persons, or certain interests of the public. In order that such information may be freely given, it is necessary to afford protection against liability for misinformation given in an honest and reasonable effort to protect or advance the interest in question."

Hunt v. Calacino, 114 F. Supp. 254
Cooley on Torts, Sec. 151, pp. 522-524
Griffin v. Opinion Pub. Co., (Mont.) 138 Pac. (2d) 580
Restatement, Law of Torts, C. 25, Sec. 598, pp. 260, 261

This definition is so universally recognized by the courts and text writers alike that a lengthy citation of authorities

would seem superfluous. And it seems equally well settled that, if the facts are not substantially in dispute, the question of whether a particular occasion is privileged is a question of law for the court.

In Swift & Co. v. Gray, (9th Cir.) 101 Fed. (2), 976, the rule is stated:

> "When the essential facts are not in dispute, the question of whether the communication is privileged is solely a question of law for the determination of the judge. Jones v. Express Publishing Co., 87 Cal. App. 256, 262, Pac. 78; Newell, Slander and Libel (4th Ed.) Sec. 345 p. 383."

Gough v. Tribune-Journal Co., supra
Sylvester v. Armstrong (Wyo.) 84 Pac. (2d) 729
Williams v. Standard Examiner Publishing Co. (Utah) 27 Pac. (2d) 1, 17
Griffin v. Opinion Publishing Co. (Mont.) 138 Pac. (2d) 580

In this case the newspaper accounts were of a meeting the purpose of which was perhaps best expressed in the headlines of the publications. The headline appearing in the Idahonian reads as follows:

"GOOD GOVERNMENT ASSOCIATION FORMED AT PUBLIC MEETING CALLED AT SCHOOL"

The headline in the Lewiston Morning Tribune reads:

"GRAND JURY DEMANDED IN ESTES CASE"

(Exhibits 1 and 6.)

The meeting reported in the articles was attended by some 150 to 200 people (R. 253). Its presiding officer was a dean of one of the colleges of the University of Idaho (R. 254). The principal speaker was a Navy captain, commanding of-

ficer of the naval R.O.T.C. unit at the university (R. 245). Among those present was the state District Judge (R. 255). The purpose of the meeting was to organize a group dedicated to securing better administration of government in Latah County and, to that end, to endeavor to obtain the impannelling of a grand jury in Latah County to investigate the conduct of certain of its officials in the handling of the so-called Estes-Shoup criminal cases (R. 246, 254). It is difficult to imagine a graver matter of public concern than maladministration of justice. Certainly maladministration of justice is as grave, or graver, a matter of public concern than occasions held by the courts to be conditionally privileged because of being matters of public concern such as inhuman treatment of a dog (Broking v. Phoenix Newspapers, Inc., (Ariz.) 264 Pac. (2d) 413), the employment of a city official to present a questionable claim against the city (Griffin v. Opinion Publishing Co. (Mont.) 138 Pac. (2d) 580), items in a county budget (Gough v. Tribune-Journal Co., supra), regulation of airplanes in the territory of Alaska (Golden North Airways, Inc. v. Tanana Publishing Co., supra), discharge of a county nurse for alleged unethical conduct (Reynolds v. Arentz (D.C. Nev.) 119 Fed. Supp. 82), or even pollution of a public water supply (Williams v. Standard-Examiner Publishing Co. (Utah), 27 Pac. (2d) 1). See also 1 Cooley on Torts, (4th Ed.), Sec. 160, pp. 572, 573.

Appellees believe therefore that the Court will not hesitate to hold that the meeting reported in the newspapers and upon which the alleged libel is based was a matter of public concern so that the newspaper reports were qualifiedly privileged, unless for some reason the privilege was lost.

The law seems equally well settled that if the alleged libelous article was qualifiedly privileged then the burden of proof shifts from the defendant to the plaintiff to prove that the alleged libel was actuated from actual malice as distinguished from implied malice.

Chesapeake Ferry Co. v. Hudgins, (Va.), 156 S.E. 429, 438
Broking v. Phoenix Newspapers, supra
Sylvester v. Armstrong (Wyo.) 84 Pac. (2d) 729
Montgomery Ward & Co. v. Watson (4th Cir.) 55 Fed. (2d) 184
Williams v. Standard Examiner Publishing Co., supra
Griffin v. Opinion Publishing Co. (Mont.) 138 Pac. (2d) 580

In the Chesapeake Ferry case, supra, the Virginia court said:

> "Malice so imputed is often designated as 'malice in law' to distinguish it from actually existing malice, which is commonly designated as 'actual malice,' 'express malice,' or 'malice in fact.' It is a creature of legal fiction invented to meet the legal fiction that has grown up that malice is an essential element of slander and libel, instead of simply declaring that the unprivileged publication of defamatory matter, false in fact, is actionable whether spoken with or without malice, and in such cases the existence of malice is immaterial unless punitive damages be sought. Coleman v. MacLennan, 78 Kan. 711, at page 740, 98 P. 281, 291, 20 L.R.A. (N.S.) 361, 130 Am. St. Rep. 390; Prince v. Brooklyn Daily Eagle, 16 Misc. Rep. 186, at page 187, 37 N.Y.S. 250, 251; Davis v .Hearst, 160 Cal. 143, 116 P. 530, 538. * * *
>
> "In the instant case the occasion was qualifiedly privileged, the words spoken were within the scope of the privilege which the occasion created, and the extent of the publication did not go beyond the extent of the privilege.

> "In such a case, in order to avoid the privilege it is necessary for the plaintiff to show that the words were spoken with *malice in fact, actual malice,* existing at the time the words were spoken; that is, that the communication was actuated by some sinister or corrupt motive such as hatred, revenge, personal spite, ill will, or desire to injure the plaintiff, or what, as a matter of law, is equivalent to malice, that the communication was made with such gross indifference and recklessness as to amount to a wanton or willful disregard of the rights of the plaintiff. Chalkley v. A.C.L.R. Co., 150 Va. 301, 143 S.E. 631; Strode v. Clement, 90 Va. 553, 19 S.E. 177; Aylor v. Gibbs, 143 Va. 644, at page 648, 129 S.E. 696; International & G.N.R. Co. v. Edmundson (Tex. Com. App. 1920) 222 S.W. 181; Finley v. Steele, 159 Mo. 299, 60 S.W. 108, 52 L.R.A. 852; Newell on Slander and Libel (4th Ed.) Sec. 271, 272, 277; Sutherland on Damages (4th Ed.) Sec. 1205; Odgers on Libel and Slander (1 Amer. Ed.) 234-238)."

In these cases it seems clear that the plaintiff wholly failed to sustain the burden of proof that the articles were published because of actual malice on the part of the defendants. Neither of the complaints allege actual malice on the part of defendants. The allegations are:

> "that such articles and publications were false and untrue, but was written, published and circulated with the intent to, and did, directly, indirectly and by innuendo, accuse the plaintiff of dishonesty, trickery, corruptness and of malfeasance and misfeasance of public office; and with the purpose of destroying plaintiff's reputation, exposing him to public hatred, contempt, ridicule and obloquy, and to deprive him of public confidence." (R. 5)

These allegations are simply conclusions of the pleader. In Gough v. Tribune-Journal Co., supra, the Idaho Court said:

> "While the complaint characterizes the publication as 'false and malicious,' the allegations appear to be a mere conclusion. Locke v. Mitchell (Calif.) 61 P. 2d 922; Babcock v. McClatchy Newspapers (Cal. App.) 186 P. 2d 737. Plaintiffs do not say the article contains false statements of fact, or that any statements of fact therein were known by the defendants to be false, or were made by the defendants without any reasonable grounds for belief in their truth, or that the defendants were actuated by a malicious motive to injure the plaintiffs rather than to promote their own, or the public, interest. *In such a case malice cannot be implied.*" (Emphasis ours)

The allegations in the complaints in the instant cases are exactly comparable to those in the Gough case, which the Idaho Court declared were insufficient to imply actual malice in the publication of an article otherwise conditionally privileged.

As pointed out by the Idaho Court in the Gough case, qualified privilege may be lost to the defendant as a defense if the privilege is abused. The Idaho Court said:

> "Where the occasion is conditionally privileged the publisher is not liable even though the publication be defamatory, unless he has abused the occasion. See 3 A.L.I., Restatement of the Law of Torts, Sec. 599 to 605 inclusive. *Such an abuse would be the publication of false statements of fact, known to be false, or without reasonable grounds for belief in the truth thereof; or where the publication is not made in good faith for the purpose of protecting the interest for which the privilege is extended, but is maliciously made for the purpose of injuring the person concerning whom it is made.*
>
> Since the allegations of the complaint show that the occasion was conditionally privileged, it was incumbent upon the plaintiff to allege facts which would support proof

that the privilege was abused. 53 C.J.S., Libel and Slander, Sec. 178; Fedderwitz v. Lamb, 195 Ga. 691, 25 S.E. 2d 414. While the complaint characterizes the publication as 'false and malicious,' the allegation appears to be a mere conclusion. Locke v. Mitchell, 7 Cal. 2d. 599, 61 P. 2d 922; Babcock v. McClatchy Newspapers, 82 Cal. App. 2d 528, 186 P. 2d 737. Plaintiffs do not say the article contains false statements of fact, or that any statements of fact therein were known by the defendants to be false, or were made by the defendants without any reasonable grounds for believe (sic) in their truth, or that the defendants were actuated by a malicious motive to injure the plaintiffs rather than to promote their own, or the public, interest. In such a case malice cannot be implied." (Emphasis ours.)

One ground for loss of the privilege is indulgence in language so far afield from the facts and of such a nature that malice in fact appears from the publication itself. Under such circumstances the issue of malice in fact is one for the jury.

Broking v. Phoenix Newspapers, Inc., supra
Emde v. San Joaquin etc. Council, (Cal.), 143 Pac. (2d) 20

A second abuse of the privilege is where the means of publication are so excessive that malice in fact can be inferred in the defamatory matter reaching readers having no common interest in the subject matter of the libel with the author.*

Whether there has been an abuse of the privilege is first a question of law for the court.

Sylvester v. Armstrong (Wyo.) 84 Pac. (2d) 729
Lehner v. Berlin Publishing Co. (Wisc.) 245 N.W. 685
Broking v. Phoenix Newspapers, Inc., supra

*Illustrations of excessive publications may be found in Browder v. Cook, (D.C. Ida.) 59 Fed. Sup. 225; Swift & Co. v. Gray (9th Cir.) 101 Fed. (2d) 976; Loeb v. Geronemus, 66 So. (2d) 241; Reserve Life Ins. Co. v. Simpson, (9th Cir.) 206 Fed (2d) 389.

Appellees submit that there is no evidence of abuse of the privilege by them in these cases.

In considering whether malice in fact appears from the alleged libelous language itself, it should be kept in mind that appellees were simply quoting the spoken words of another person. While it is true that repeating defamatory matter first published by another person is not necessarily a defense to a libel action, certainly a newspaper's publishing the quoted words of another negates malicious intent. Try as we may the only language that we can discover appearing in either of the printed articles that could be considered as defamatory of appellant is the statement by Captain Thomas that "had this been an honest mistake, it could have been easily rectified by lifting a telephone and telling the prosecutor to bring his witnesses and come on over." Appellees believe this statement is a fair comment on conceded facts and falls within the rule of fair comment discussed under another section of this brief. In any event we submit that the admitted facts justify the statement to the extent that the qualified privilege was not destroyed .The charge made by Captain Thomas and quoted in the newspapers is a long way from reaching the defamatory matter held not to destroy the privilege in many of the decided cases.*

*Charge of manslaughter, Williams v. Standard Examiner Publishing Co., (Utah) 27 Pac. (2d) 1.

Drunkenness and embezzlement, Sylvester v. Armstrong, (Wyo.) 84 Pac. (2d) 729.

Stealing and lying, Montgomery Ward & Co. v. Watson, supra.

"Damn thief," McKenzie v. Burns Detective Agency, (Minn.) 183 N.W. 516.

"Damned thief," Southern Ice Co. v. Block, (Tenn.) 189 S.W. 861.

Drunk and boisterous, Chesapeake Ferry Co. v. Hudgins, (Va.) 156 S.E. 429.

Since there was no unusual distribution of the published articles there was no excessive publication under which the privilege could be lost. In I Cooley on Torts, (4th Ed.) Sec. 158, p. 543, the author says:

> "But in the case of a matter of public interest the communication may be made through the ordinary channels of reaching the public or that part of the public which is interested in the communication. If the matter is one of general public interest no difficulty can arise, for all are presumably interested and the communication can reach none who are not. But in matters of local public interest any communication made in the ordinary way, though the public prints may reach those who have no interest, either because they are not residents or taxpayers of the locality, or because they do not belong to the class concerned. *The correct rule would seem to be that the privilege extends not only to the right to make the communication but to the right to make it in the ordinary, usual and only practicable way.*" (Emphasis ours)

In the Gough case, the Idaho Court said:

> "The defendant newspaper, being the appropriate and customary medium for the transmittal of communications such as that involved, is privileged in the same manner and to the same extent as the individual defendants. Gough v. Tribune-Journal Co., 73 Idaho 173, 249 P. 2d 192; Rogers v. Courier Post Co., 2 N.J. 393, 66 A. 2d 869; Caldwell v. Crowell-Collier Pub. Co., 5 Cir., 161 F. 2d 333, certiorari denied 332 U.S. 766, 68 S Ct. 74, 92 L. Ed. 351; 53 C.J.S., Libel and Slander, Sec. 121, 123, 131, 132 and 134."

Montgomery Ward & Co. v. Watson, (4th Cir.) 55 Fed. (2d) 184

Coleman v. MacLennan, (Kan.) 98 Pac. 281

Noel, Defamation of Public Officers and Candidates, 49 Col. L.R. 875, 899

Qualified privilege in the law of libel is based upon the legal principle that there must be freedom of speech and freedom of the press if our system of government is to survive. It simply recognizes the fact that the right of the people to speak freely on matters of public concern, when done without malice, outweigh the injury or damage to the person defamed.

> Coleman v. McLennan, supra
> Noel, Defamation of Public Officers and Candidates, 49 Col. L.R. 875

The trial court heard the testimony and saw the witnesses on the witness stand. In directing the jury to return a verdict for the defendants, he said:

> "The rule that you cannot criticize those in governmental positions is an old rule and does not exist in this land of ours. Judges and all public officers from the lowest public offices to the highest, are subject to criticism, if the criticism is fair and honest. The people are vitally concerned in the conduct of those that are elected or appointed to public office. The interest of the public here outweighs the interest of the plaintiff or any other individual. The protection of the public requires not merely discussions but information. Conduct and views which some disapprove and others approve are constantly imputed to our public officers. Errors of fact are inevitable and information and discussion will be discouraged and the public interest in public knowledge of important facts will be poorly defended if stating the facts fairly subjects the author or the newspaper publishing the comment to a libel suit without even showing an economic loss. *Public interest outweighs the utterance or publication complained of. There can be no mistake that the author and publisher here stated the facts fairly and without malice.*" (R. 288, 289.) (Emphasis ours.)

Appellees submit that the statements of the trial court are the law of this case and that, the publication being conditionally privileged, the directed verdict in favor of the defendants was proper.

THE ALLEGED DEFAMATORY MATTER WAS FAIR CRITICISM

The defense of fair criticism that denies a plaintiff the right to recover damages in a libel action, in the absence of proof of express malice, is closely aligned to the rule of qualified privilege and, in fact, in many decisions little if any distinction is made between them. The distinction rests in the fact that in the case of qualified privilege liability is denied because of the occasion upon which the defamatory matter is published and is denied, in the absence of special damages, even though the defamatory matter is libelous per se. In the case of fair comment, liability is denied, if based upon the facts as known to the author, when he honestly and without malice, criticizes the conduct of the person defamed. The rule of fair comment is well stated in Griffin v. Opinion Publishing Co. (Mont.) 138 Pac. (2d) 580, as follows:

> "The public conduct of every public officer and candidate for office is always a matter of public concern in the community in which he holds or seeks office. * * * The concern which all citizens have in the proper conduct of public affairs by public officials requires that they have a wide freedom to discuss among themselves the public conduct of their officers and the qualifications to those who seek public office. Those who hold such offices and those who offer themselves as candidates therefor, by so doing subject their public acts to honest

that they were true, vitiates the defense. As pointed out earlier in this brief, it is the rule of this jurisdiction that misstatements of fact, if made without malice and in an honest belief that they are true, still does not subject the author to liability.

Gough v. Tribune-Journal Co., supra.

This does not mean that the rule of fair criticism is unrestricted. Even in those jurisdictions where recovery is denied, even though unintentional misstatements of fact are made, the privilege is lost if based upon facts known to be false. Gough v. Tribune-Journal Co., supra. It is also lost if the defendant cannot justify the defamatory statements as substantially true, particularly in cases of defamation on private matters. Fair Comment, 62 Harvard Law Review, page 1211.

The author in the Harvard Law Review further says at pages 1207-1213:

> "Matters of Public Interest. — Since fair comment is an affirmative defense, derogating from an otherwise perfected liability, the defendant must satisfy the court that the subject matter of the comment is of such interest to the public that he should be free to make it without paying for the harm he does by defaming the plaintiff. For the most part, agreement on where to draw the line between public and private interest has been as general as agreement that a line should be drawn, although some of the agreed categories are so vague that there is considerable flexibility in application. Thus, it is well settled that subjects of public interest, for this purpose, include the official or otherwise public activities of executive, legislative, or judicial officers, elected or appointed; the public conduct of candidates for elective office so far as pertinent to their election; work done for governmental institutions by independent contractors paid out of public funds; private activities or institutions affecting a substantial number of the public; public per-

formances or exhibitions of music, drama, sports, or works of art; and anything else inviting public attention and approval such as books, articles, or advertisements. * * *

"Despite these qualifications the distinction, more often announced than defined, between comments and statements of fact is often crucial to the outcome of fair comment litigation. If the defense of fair comment did not exist, then when defamatory statements were made that could neither be proved true or false as fact nor be proved correct or incorrect as comment, the conflict of interests would always be resolved in the plaintiff's favor, since the burden of justification is on the defendant. But the formation of public opinion on public affairs is a legitimate function of the press and indeed of any citizen; and both practical experience and modern propaganda research demonstrate that public opinion cannot be formed effectively without resort to statements of the kind described by some logicians as 'meaningless' in the sense that empirical tests cannot establish their truth or falsity, correctness or incorrectness. On the other hand, there is little public interest in protecting the added propaganda effectiveness that stems from the credence mistakenly given to a defamatory statement as one of fact; and such credence enhances the damage done to the reputation of the person defamed. In these circumstances it is submitted that the defense should extend only so far as is necessary to protect statements that the average reader will recognize as statements of opinion although his own thinking may be influenced by the opinions as such. The test, therefore, for distinguishing fact from comment should be as follows: the statement in question should be regarded as one of fact if a substantial number of readers would understand it as intended to convey ideas the asserted validity of which is independent of the belief of the person making the statement. If a substantial number of readers would understand the statement to rest solely on the opinions of the person making the statement, the statement should be regarded as comment and should come within the privilege if the matter is one of public interest."

He concludes, pages 1215-1216:

> *"Unless shown to be malicious, a defamatory statement found to be comment on a matter of public concern is privileged even if incorrect, illogical, negligently uttered, or harshly phrased; the defendant need not convince the trier of fact that a reasonable man, considering the facts stated or available to the reader, could have made the comment in question.* (Emphasis ours.)
>
> Thus the privilege of what is still often called 'fair' comment ostensibly protects a wide range of violent or vulgar defamatory language. At present the possibility that the privilege will be abused by such invective is partially controlled by the availability to the courts of three limiting devices, each of which properly serves an independent purpose but also is frequently applied to impose liability for comment to which the only real objection is that it 'goes too far.' The violence of the statement may be held to support an inference of malice; the comment may be held to constitute an attack on private character and thence to be no longer upon a matter of public concern; or the statement may be characterized as one of fact, although, from the standpoint of consistency with the ordinary criteria of factual statement, the more violent the language the more obvious it should be to the reader that the statement rests upon no other authority than the opinion of the writer.
>
> "Nevertheless, it must be conceded that fair comment sometimes enables journalists and others to escape liability for defamatory language which offends the taste and moral sense of a substantial part of the community.
>
> This occasional abuse is part of the price of free speech; and the only practical alternative — an express rule that the privilege is destroyed if the language 'goes too far' — would encourage a judicial severity more pernicious than the evils it might correct."

While the rule of fair comment may readily be stated in the abstract, its application becomes difficult when the at-

tempt is made to distinguish between statements of fact and comment and criticism. Particularly is this true when the statement contains an expression of the motives of the person being criticized in the performance of the acts complained of. However, it is now generally conceded that imputations of wrongful motives, having a reasonable basis in the known facts, come within the privilege of fair comment.

In 49 Columbia Law Review commencing at page 880 the author says:

> "Assuming that a statement unquestionably is classed as comment, must the comment be 'fair' in the sense that a person of reasonable intelligence and judgment might possibly agree with it? The name of the defense and the way in which it is pleaded create the risk of an affirmative answer to this question. It is usual for the defendant to plead that the statements of fact contained in the publication are true and that all other statements therein are 'fair' comments on these facts. Actually, however, the requirements as to the fairness of the comment differ considerably, depending on whether the criticism is of activities of public concern or of motives for public acts.
>
> "1. Comment on Activities of Public Concern. Where the criticism is limited to activities of public concern and avoids personal attack, it is not essential that the comment in fact be 'fair' in order to be privileged. As the Restatement of the Law of Torts points out, 'if the public is to be aided in forming its judgment upon matters of public interest by free interchange of opinion, it is essential that honest criticism and comment, no matter how foolish or prejudiced, be privileged.' It follows that the jury may not substitute its judgment on the matter in controversy for that of the defendant, and exclude from the immunity of fair comment all criticism with which it disagrees. The only requirement seems to be

that the facts upon which the opinion is based must be stated or else readily available to the persons to whom the comment is addressed and the comment may not be so completely unrelated to the facts upon which it is made that it may be taken to imply the existence of other undisclosed facts. Where that is the case, the so-called comment in effect is a statement of fact rather than simply criticism.

"2. Comment on Motives for Public Acts. Does the privilege of fair comment include an erroneous statement of an official's motive in performing a public act? It has been said in this connection that 'there is a broad distinction between fair and legitimate discussion in regard to the conduct of a public man, and the imputation of corrupt motives, by which that conduct may be said to be governed.'

"There is a certain logic in classifying a statement of motive as a statement of fact. It has been aptly said in another connection that 'the state of a man's mind is as much a fact as the state of his digestion.' Clearly it is of importance in deciding on the qualifications of a public officer or candidate to know not only how he acted, but what motivated the act. It would be of obvious importance, for example, to know whether a legislator voted for a dry law because he was an ardent prohibitionist or because he wished to aid bootleggers who were profiting from the law. *As one writer puts it, if the privilege of comment excludes statements about motives, the courts are in effect saying: 'You have full liberty of discussion, provided, however, you say nothing that counts.'* (Emphasis ours.)

"In line with these views, it has long been settled in the English courts that imputations of wrongful motives come within the privilege of fair comment. Inferences as to motive, however, unlike inferences relating simply to public activities, must have a reasonable basis, according to the English decisions. Thus in the leading case

of Campbell v. Spottiswoode, it is said:

". . . a line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation."

The author concludes (49 C.L.R. page 903):

"The most needed development, however, is wider acceptance of the rule that there is a conditional privilege to make misstatements of fact. Most of the uncertainty of the law arises from the difficulty of disentangling comment, statements of motives, and statements of fact; this uncertainty would be avoided if all comments and statements about political officers and candidates were conditionally privileged. Such a rule would provide needed encouragement to those who wish to speak out honestly and with due care in the public interest, and the conditional character of the privilege would guarantee adequate protection to officers and candidates."

In the instant case the alleged defamatory matter set forth in the complaints contains no misstatement of fact. In case No. 14469, the first sentence of the alleged libelous matter reads:

"Thomas then made reference to legal maneuvers in which a hearing was set for January 15 at 9 a. m."

This statement is true. It is undisputed. The original complaint was filed in the probate court. The original place fixed for hearing was the courtroom of the probate court, but by reason of voluntary disqualification of the probate judge the case was transferred to appellant's court. Appellant at-

tempted to dissuade the prosecutor from attending the hearing. The hearing was held in the district court courtroom although no formal order was made by appellant changing the place of hearing. The case was dismissed at 9:07 in the morning (R. 226) for lack of evidence. No attempt was made to contact the prosecutor or anybody else although the prosecutor was waiting at the Police Court some four blocks away. To a layman, this tortuous path, ultimately leading to a dismissal of the charge without a hearing, is aptly termed "legal maneuvering."

The next sentence of the alleged libelous matter reads:

> "At 8 a. m. that day, Thomas explained, Alsager notified Judge John K. Borg that he would be ready at 9."

That the prosecuting attorney did so notify appellant is admitted (R. 89).

The next sentence in the alleged libelous matter is:

> "Alsager and his witnesses were present at police court, normally the place where such hearings are held. But the judge and Estes, Thomas said, had gone to the county courthouse to hear the case."

It undoubtedly will be urged that the statement that the courtroom of the police court "was normally the place such hearings were held" was an erroneous statement of fact. However, there is evidence that preliminary hearings were held at police court, and, in fact, the second preliminary hearing against Estes was set for the police court but after the hearing opened, was adjourned to the district courtroom. In fact appellant himself testified:

> "On all my important cases, where the attendance would supposedly be large, I have held them at the Courthouse, rather than at the small room in the Police Station. * * * (R. 103.)

"Q. Did I understand you to say, Mr. Borg, in your last examination by Mr. Tonkoff, that you had never held a preliminary examination in the Police Court?

"A. It is a little hard to determine because it is quite different as to what constitutes a preliminary hearing. I suppose any case where the defendant pleads not guilty it would perhaps be a preliminary hearing, and if that is the case I have certainly had some of those in the courthouse and at the Police Station." R. 111.)

In any event the statement that the police court "was normally the place where such hearings were held" is certainly not sufficient alone to destroy the privilege of fair comment. In 62 Harvard Law Review, page 1212, the author says:

> "The second qualification to the rule that the defendant must justify defamatory statements of fact as true is seen in the cases that appear to apply a looser criterion of truth to statements on matters of public interest than is customary in defamation on private matters. *The American cases, at least, give generous effect to the idea, found also to a lesser extent in defamation on private matters, that the statement need be justified only substantially and not literally, and that if the 'sting' of the libel is true, the auxiliary remarks though derogatory need not be justified.* (Emphasis ours.)

The next sentence in the alleged libelous publication is:

> "'This was a ridiculous situation,' said Captain Thomas."

This comment was certainly justified under the ludicrous circumstances of a prosecutor and his witnesses appearing at one courtroom while the presiding judge, the defendant and his attorney held court in another courtroom some distance away.

The next sentence in the alleged libelous matter reads:

> "A motion for dismissal was made and it was dismissed."

These facts are admittedly true. (R. 54)

The balance of the alleged libelous matter reads as follows:

> "If this had been an honest mistake, it could have been easily rectified by lifting a telephone and telling the prosecutor to bring his witnesses and come on over.'
>
> * * *
>
> "But these things, Thomas said, 'continue to disturb me:
>
> * * *
>
> " '3. The extraordinary circumstances in which the first felony was dismissed.
>
> " '4. Circumstances of the dismissal of the second charge against Estes.
>
> * * *
>
> " 'There is no way to get justice or to correct the faults in the administration of justice * * * without a grand jury,' Thomas concluded."

These statements by Captain Thomas clearly are all matters of opinion. In the first sentence wherein Captain Thomas said: "If it had been an honest mistake," he expressed only his opinion of the motives of appellant in dismissing the first criminal complaint against Estes without having attempted to make any effort to locate the prosecuting attorney or the complaining witnesses (R. 86).

In case No. 14470 the alleged libelous matter is almost identical with the matter set forth in the complaint of case

No. 14469, with the exception of some additional items. The first additional sentence of alleged libelous matter reads as follows:

> "The meeting opened with a long and detailed review of the Estes-Shoup case by Capt. Thomas C. Thomas, commander of the University Naval ROTC unit, of which Shoup was a member."

This fact is not disputed (R. 245, 255). The next sentence reads:

> "Captain Thomas declared that 'I don't like the smell of it. I don't think we have here in this county now the proper administration of justice.'"

This again is purely an expression of opinion.

The next sentence reads:

> "Estes went to the Perch, a campus restaurant, and there accosted Shoup with a pistol."

The evidence shows without contradiction that Estes went to the campus restaurant, exposed a gun to several people, accused Shoup of insulting his wife, struck him violently in the face, struck the proprietor of the restaurant with the muzzle of a gun in an effort to prevent Shoup's escape, and for a considerable period of time continued to make threats against the boy's life (Exhibit 23). The remaining alleged libelous matter reads:

> "What to do about it? There has been no change in the local setup since December. The same faces now hold office. The same thing could take place and again we'd go through this same rigamarole."

The facts above stated are true and are not libelous. The captain's opinion that "there is no way to get justice or to

correct the faults in the administration of justice * * * without a grand jury" was simply stating a lawful means of correcting what he considered to be a miscarriage of justice. Since the only purpose of the Captain's statements was to secure correction of what he considered a maladministration of justice in the inferior courts of Latah County through the medium of a grand jury, and the calling of a grand jury is sanctioned by the laws of the State of Idaho (Sec. 8, Art. 1, Constitution, Idaho)* his statement could not be considered libelous.

A court cannot impute unlawful or malicious motives to the actor when the things done and the means employed are lawful.

> Gough v. Tribune-Journal, Inc., supra
> Barton v. Rogers, 21 Idaho 609, 123 Pac. 478
> 40 L.R.A. (N.S.) 681

It is the law that, in the absence of actual malice, the severity of language employed in the criticism does not destroy the privilege the law affords fair criticism.

> Montgomery Ward & Co. v. Watson (4th Cir.) 55 Fed. (2d) 184
> Williams v. Standard Examiner Publishing Co. (Utah) 27 Pac. (2d) 1
> Griffin v. Opinion Publishing Co. (Mont.) 138 Pac. (2d) 580
> Sylvester v. Armstrong (Wyo.) 84 Pac. (2d) 729

It is only where the violence of the statement is such as to support an inference of malice that the comment may be held to constitute an attack on private character and tends to be no longer upon a matter of public concern. In Sylvester

*Sec. 8, Art. 1, Constitution, Idaho, is set forth in Appendix B.

v. Armstrong, supra, the Wyoming court quoted with approval from Ashford vs. Newspaper Co., 41 App. Cas. 395, 405 and Odgers on Libel and Slander, Fifth Edition, p. 394, the rule for determining whether the language used exceeds the privilege of fair criticism as follows:

> "Before the inference of express malice can be indulged, the publication must, in comment, be so *excessive, intemperate, unreasonable* and *abusive* as to *forbid any other* reasonable conclusion than that the defendant was actuated by express malice. * * *"
>
> "But the test appears to be this. Take the facts as they appeared to the defendant's mind at the time of the publication; are the terms used such as the defendant might have honestly and bona fide employed under the circumstances? If so the judge should stop the case."

Viewing the undisputed facts in this case from a layman's standpoint it seems clear that the verbiage used by Captain Thomas in expressing his opinion of the handling of the Estes-Shoup cases was mild. Appellant established this by the testimony of his own witness, former District Judge A. L. Morgan. Judge Morgan testified:

> "Q. Was anything said in these conversations regarding John Borg in connection with the dismissal of the two charges which had been filed against Murray Estes in his Court?
>
> "A. What was the question?
>
> "(Previous question read to the witness.)
>
> "A. Well, again I am not sure that I understand that question. Even this afternoon I was talking to one of the nurses here and she said, 'How is it the lawyers all got off. There must be something crooked or wrong about it.' * * *" (R. 133)

"Q. You referred to one of the nurses remarking that there must have been something crooked in connection with all lawyers getting off. Were similar remarks made in the discussion by other persons?

"A. With reference to other people, a number of them did inquire as to just why a lawyer could get away with a matter of that kind or a judge would dismiss a case under the circumstances outlined in that article. (R. 134)

Further it appears from appellant's own testimony that the harsh criticism of his conduct over the dismissal of the first case arose long before the alleged libelous publications and continued up to the time they were made. He said:

"Q. After you left the Police Station, during the rest of the day, there was a considerable amount of talk around town about the case being dismissed?

"A. Yes.

"Q. In fact, there was a great amount of talk, wasn't there?

"A. There was quite a bit. I don't know whether it all got to my attention or not.

"Q. You were conscious of the fact that you were being severely criticized for dismissing the case, even in that early afternoon?

"Mr. Tonkoff: That is objected to as calling for a conclusion of the witness and it is outside of the direct examination.

"The Court: He may answer.

"A. Yes.

"Q. Do you recall, Mr. Borg, reading the newspaper articles in the Spokesman Review on the morning of January 16, 1953, about your dismissal of this case?

"A. There were several articles; as far as the dates, I can't say.

"Q. Well, shortly after you dismissed this case, within a day or two (sic) were hearing public rumors of criticism of your action, were you not?

"A. A day or two later there was an article in the Spokesman Review.

"Q. And you wrote a letter to the Spokesman Review about that article, did you not?

"A. Yes, sir; I did." (R. 100, 101) * * *

"Q. You referred to the fact that immediately after you dismissed this case on January the 15th you became conscious that there was a lot of talk and criticism against you?

"A. Yes.

"Q. Did that criticism and what you were conscious of continue up to May 13?

"A. For a considerable length of time.

"Q. You recall when the newspaper articles were published, don't you?

"A. What was that?

"Q. You recall the dates when the newspaper articles were published?

"A. What date?

"Q. Yes, is that date in your mind now?

"A. No, sir.

"Q. Assuming that the newspaper articles came out, the articles that are the subject of this lawsuit, one in the Daily Idahonian and one in the Morning Lewiston Tribune on May 13, 1953 — assuming that was the date, did that criticism and public talk continue up to the date that these articles were published?

"A. Yes, sir." (R. 104)

It is certain the public reaction to the dismissal, long prior to the publication of the alleged libel, was as strong or

stronger than that of Captain Thomas. Such being the case his criticisms did not exceed "fair" comment and are not actionable.

Odgers, Libel and Slander (5th Ed.) p. 394.

THE ARTICLES WERE TRUE AND ARE NOT LIBELOUS PER SE

The defenses that the published articles were true and not libelous per se will be considered together. While there is a great distinction between the defenses of truth and not libelous per se in the instant case, appellees believe the substantial evidence shows that the facts in the published articles were substantially true so that there was no question to submit to the jury on the issue of truth or falsity. Since truth is always a defense to an action for libel, irrespective of how defamatory the published matter may be or how great the damage resulting to the person defamed, it follows that being true, the defamatory matter could not be libelous per se. As heretofore pointed out appellant, in his brief, assumes the alleged defamatory matter to be false and, as heretofore pointed out, the complaint fails to point out what facts are false or upon what basis they are claimed to be false. On pages 31 and 32 of his brief, appellant lists what he considers "would ordinarily and reasonably be understood by an ordinary reader" of the published articles. Of the articles considered in case No. 1950 (No. 14469 in this court), he charges:

> "(1) That the plaintiff was a party to legal maneuvers preventing the administration of justice.
>
> "(2) That plaintiff ridiculously and without reason on grounds granted a motion for dismissal in order to defeat justice."

Of the article considered in case No. 1951 (No. 14470 in this court), he charges:

> "(1) That plaintiff refused to properly administer justice.
>
> "(2) That plaintiff took part in legal maneuvers making it impossible for the prosecuting attorney to fairly try his case.
>
> "(3) That plaintiff entered into a conspiracy with the defendant in a criminal charge to defeat the administration of justice.
>
> "(4) That the plaintiff was situated in a ridiculous situation in connection with the administration of justice.
>
> "(5) That the plaintiff acted dishonestly in dismissing a criminal charge.
>
> "(6) That plaintiff wilfully failed to administer justice."

Appellees have no doubt that the appellant will hinge his argument of asserted falsity of the alleged defamatory matter upon the expression of Captain Thomas that "if it had been an honest mistake." Appellees believe the rule to be that in establishing the defense of truth of an alleged defamatory article it is not necessary to establish the truth of each and every of the alleged defamatory statements but only to such an extent as to establish the substantial truth of the defamatory statements. If the rule were otherwise, in many cases it would be literally impossible to prove the truth of each and every word or phrase in the exact language of the article and would thereby deprive the defendant of the defense of truth in many cases.

"In reaching this conclusion, we have borne in mind as we must, in determining whether it goes beyond a substantially true statement of the facts, that the whole of the publication must be considered. The fallacy in plaintiff's argument is that it conflicts with this cardinal rule of the law of libel, which 'flatly prohibits' any attempt to wrench a word or a phrase of an article out of context and base an action thereon. The whole of the reported article must be considered in determining whether it is actionable and whether it transcends a substantially true statement of the facts. 53 C.J.S., Libel and Slander, Sec. 10; Estill v. Hearst Pub. Co., 7 Cir. 186 F. 2d 1017, 1021. We conclude, therefore, from a consideration of the whole of the publication, that there is nothing to justify a finding or an inference that the reporter exceeded a substantially true statement of the facts. The essential truth of a news report is always a defense to an action for libel. 53 C.J.S., Libel and Slander, Sec. 122; Walford v. Herald Printing & Publishing Co., 133 Ind. 372, 375, 32 N.E. 929, 930; Heuer v. Kee, 15 Cal. App. 2d 710, 59 P. 2d 1063, 1064-5; State Journal Co. v. Redding, 175 Ky. 388, 194 S.W. 301, 303. Obviously if the report, admitted to be true by plaintiff's failure to controvert the factual averments made by defendants, was true, it matters not what it reported. It follows that the trial court was not justified in doing other than allow the motion for summary judgment."

Rose v. Indianapolis Newspapers, 213 F. 2d 227

" 'A plea of justification is sustained by justifying so much of the defamatory matter as constitutes the sting of the charge. It is unnecessary to repeat and justify every word of the alleged defamatory matter if the substance of the charge be justified. If the substantial imputations be proved true, a slight inaccuracy in the details will not prevent a judgment for the defendant, if the inaccuracy does not change the complexion of the affair so as to affect the reader of the article differently than

the actual truth would.'" Heuer v. Kee, 15 Cal. App. 2d 710, 59 P. 2d 1063 at page 1065; Leghorn v. Review Pub. Co., 31 Wash. 627, 72 P. 485; Eddy v. Cunningham, 69 Wash. 544; 125 P. 961."

Laughton vs. Crawford, 68 Idaho 578 at 581, 201 P. 2d 96

"It has been held that newspapers are not to be held to the exact facts or to the most minute details of the transactions they publish, that what the law requires is that the publication shall be substantially true, and that mere inaccuracies, not affecting materially the purport of the article, are immaterial. So it has been held that, where the publication complained of was published in good faith and with a belief that it was true, and the evidence shows it to be substantially proved, the defense is complete; that is to say, if the publication made goes no farther than to state the facts of the occurrence or the transaction, and the facts so stated turn out to be substantially proved, no ground will be given for the recovery of damages by one who feels himself aggrieved or injured by such publication."

53 C.J.S. Sec. 122 at page 201

We further believe the rule to be so well settled as to hardly require a citation of authority that in determining whether an article is libelous per se the courts consider the whole of the defamatory article and not certain isolated words, phrases or sentences appearing therein. Also in determining whether the alleged defamatory matter is libelous in law, it will consider the way in which the article would be understood by the average reader, as to whether the alleged defamatory matter is such as to impeach the honesty, integrity, virtue or reputation of one who is alive, and thereby to expose him to public hatred, contempt or ridicule. Jenness v. Coop. Pub. Co., 36 Idaho 697, 213 Pac. 351. It appears to appellees that

reading the article as a whole clearly indicates that when Captain Thomas used the expression "if it had been an honest mistake" the actual and reasonable meaning and interpretation of those words were that the mistake was unintentional. In other words he intended to convey the meaning that if the facts of the prosecutor and the witnesses appearing at the city hall while the defendant, his attorney and the judge appeared at the district court room had been an unintentional mistake, the mistake could have been rectified by the judge calling the prosecutor and telling him to bring his witnesses and come on over. Appellees believe that the evidence clearly establishes that the dismissal of the first Estes complaint by Judge Borg was intentional and that the uncontradicted evidence so shows. The undisputed facts supporting this claim are as follows:

1. Appellant's attempt to dissuade the prosecuting attorney from attending the preliminary hearing at the meeting at the Elks Club in Moscow on the afternoon of January 14th. (R. 53 and 88)

2. The admitted fact that the prosecutor advised appellant at 8 o'clock on the morning of the 15th that he would attend the hearing. (R. 86-89-165)

3. That appellant made no effort to contact the complaining witness, to procure a court reporter, or to contact any official at the courthouse for permission to use the district courtroom for the purpose of the hearing. (R. 86)

4. That appellant made no effort to contact the prosecuting attorney, the sheriff's office, or any other person to ascer-

tain why the prosecutor and his witnesses had not appeared at the time fixed. (R. 86)

5. The dismissal on motion of counsel for defense within a few minutes after the time fixed for hearing. (R. 227-50-51-86)

6. And most important of all the letter written by appellant to the Spokesman Review on January 16th in which appellant stated, without having heard the witnesses or having any knowledge of what evidence might be produced, if a preliminary hearing had been held, as to the guilt of Estes, that in his judgment Estes was not guilty of the offense charged. (R. 102-103)

7. The admitted statement in the letter to the Spokesman Review that he was negligent in the handling of the case. (R. 103)

Considering these undisputed facts together, no two or more people could conclude otherwise than that appellant, without hearing the proofs, believed that Estes was not guilty of the crime charged, and intentionally dismissed the criminal proceeding without affording the prosecutor the opportunity to appear and present his case. It seems patent, therefore, that the dismissal without a hearing and without attempting to contact the prosecuting attorney, although several telephones were immediately available, leaves no room for doubt but that the judge was intentionally taking advantage of the fact that the prosecuting attorney had appeared at the city hall and hence dismissed the case. If these facts are true, and appellees submit they are undisputed in the record, then we sub-

mit that the expression used by Captain Thomas "that if thi was an honest mistake" was true and cannot be considere libelous. It was in this sincere belief that the trial judg made the statement at the time he granted the motion for directed verdict that "Indeed, it appears to me that there mus be considerable imagination injected into any consideration o this, to reach the conclusion that the articles were libelous - much less published with malice." (R. 288)

The only other possible claim of defamatory matter charge in the complaints is quoted language in case No. 14470, read ing as follows: "What to do about it? There has been n change in the local setup since December. The same face now hold office. The same thing could take place and again we'd go through this same rigamarole. There is no way t get justice or to correct the faults in the administration o justice in Latah County without a grand jury." (R. 6) I appears on the face of this statement that the reference wa made to all of the officials of Latah County and others wh were involved in the Estes-Shoup matters. These would in clude the probate judge, the prosecuting attorney, the distric judge, Justices of the Peace Borg and Kent Powers and at torney Huff. Since there could be no singling out of any on of them as being the individual toward whom the statement were directed, the charge of libel cannot stand.

In Golden North Airways, Inc. v. Tanana Publishing Co. supra, this court, citing many authorities, said:

> "The person *to whom* the publication is made mus understand to whom it refers. And if the person is no referred to by name or in such manner as to be readil identified from the descriptive matter in the publication

extrinsic facts *must be alleged and proved* showing that a third person other than the person libeled understood it to refer to him. Restatement, Torts, Sec. 564; Gatley on Libel and Slander, 4th Ed., 1953, p. 113; Fraser, Libel and Slander, 7th Ed., 1936, p. 8-9; Odgers, Libel & Slander, 6th Ed., 1929, pp. 123-130; Rhodes v. Naglee, 1885, 66 C. 677, 680, 6 P. 863, 865; Harris v. Zanone, 1892, 93 C. 59, 66-68, 29 P. 845, 846-847; Richardson v. Cooke, 1911, 129 La. 365, 371, 56 So. 318, 320; Washer v. Bank of America, 1943, 21 C. 2d 822, 829, 136 P. 2d 297, 301.

"The complaint in this case is bare of any facts that could actually be called an inducement in the light of which the article can be said to refer to the appellant. Nor is there a direct allegation that any third person understood the article to refer to the appellant corporation. But, laying aside the question of pleading, there remains the *lack of proof*. The appellant did not offer to prove that any person other than itself or its officers understood the article to refer to the appellant. This alone would be fatal to recovery. Marr v. Putnam, 1952, 196 Ore. 128, 246 P. 2d 509, 521; Restatement, Torts, 1938, Sec. 564, Comment B; Note, 41 Cal. L. Rev., 1953, p. 144; Gatley on Libel and Slander, 562-565; State v. Mason, 1894, 26 Ore. 273, 38 P. 130; Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd., C.A., 1934, 50 Times Law Reports 581, 587; 99 A.L.R. 864, 876."

The complaint in the instant case fails to allege and there is a vacuum of evidence in the record to establish that the last quoted remarks of Captain Thomas were directed at appellant. Appellees, therefore respectfully submit that when the articles are read as a whole and in the light of the evident meaning intended to be conveyed by Captain Thomas, and the manner in which his remarks were quoted in the printed articles, the alleged defamatory matter was either true or of

such a nature that it would not stand the acid test of being libelous per se, in the absence of appellant being identified as the intended recipient of the remarks; and, while the trial court did not specifically indicate in his opinion that he was granting the motion for directed verdict on the ground that the alleged defamatory matter was not libelous per se, his action in directing the verdict can be sustained on both grounds.

ERRORS IN RULINGS ON THE ADMISSIBILITY OF EVIDENCE ARE NOT MATERIAL

Nine claims of error are made on the rulings of the trial court in rejecting certain evidence offered by appellant. These are classified for the purpose of argument into four groups as follows:

1. Error in rejecting certain publications appearing in the Daily Idahonian prior to the date of the article in which the claimed libel appears.

2. Error in refusing to admit testimony of certain individuals as to their understanding of what the printed article charged appellant.

3. Refusing to permit opinion testimony as to appellant's duties in conducting a preliminary hearing.

4. Refusal to permit the prosecuting attorney of Nez Perce County, on rebuttal, to testify as to a telephone conversation had with the prosecuting attorney of Latah County.

Appellees deem it necessary to only briefly answer the first of these contentions. In the first place we desire to call

attention to the erroneous statement in appellant's brief that the newspaper articles offered were "prior and *subsequent* publications." (Emphasis ours.) There were no subsequent publications offered. The publications offered in the trial court were four newspaper items apearing in the IDAHONIAN, two, under date of January 16, and one, each, under the dates of April 9 and April 13, 1953.

Appellant contends that these articles were admissable for the purpose of establishing knowledge on the part of appellees in case number 14469, that they knew the alleged defamatory matter was false, that the publications showed evidence of malice and were admissible for the purpose of justifying an award of punitive damages. It was not claimed that there was any defamatory matter in these articles, that they were false in any respect or that appellees in case No. 14469 knew them to be false. Appellees believe the rule to be that subsequent repetitious publications of the alleged defamatory matter are admissible for the purpose of establishing malice and as a possible bearing for an award of punitive damages. However, prior publications entirely innocuous could certainly neither tend to establish false knowledge on the part of the publisher, malice in making the publication in question nor furnish the basis for an award of punitive damages. Appellees submit the ruling of the trial court that these previous news stories had no bearing upon the issues involved in the publication of the article of May 13, 1953, and therefore were immaterial. Duncan v. Pearson (4th Cir.) 135 Fed. 2d 146.

As to the three remaining groups of assignments of error on the admission or rejection of evidence, we submit the proferred evidence has no bearing upon the correctness of the

trial court's ruling in granting the motion for directed verdi and could only be concerned with the matter of an award damages. We believe the rule to be well settled that appella court will not pass upon the rulings of the trial court if th correctness or incorrectness of those rulings has no bearin upon a determination of the appeal.

CONCLUSION

The right of free speech, a free press, and the right of th people to peaceably assemble to petition their government fo a redress of their grievances is guaranteed by the first amen ment of the Constitution of the United States, and Sectio 9 and 10, Article I, of the Constitution of the State of Idah guarantee the right of free speech and that "the people sha have the right to assemble in a peaceable manner, to consu for their common good; to instruct their representatives, an to petition the legislature for the redress of grievances."

In Grogean v. American Press Co., 297 U.S. 233, 80 L. e 660, Justice Sutherland said:

> "The predominant purpose of the grant of immuni here invoked was to preserve an untrammeled press a vital source of public information. The newspaper magazines and other journals of the country, it is sa to say, have shed and continue to shed, more light c the public and business affairs of the nation than ar other instrumentality of publicity; and since informe public opinion is the most potent of all restraints upo misgovernment, the suppression or abridgment of th publicity afforded by a free press cannot be regarde otherwise than with grave concern. * * * A free pre stands as one of the great interpreters between the go ernment and the people. To allow it to be fettered is fetter ourselves."

In this case appellees sincerely submit that the record shows that in printing the address of Captain Thomas they acted entirely without malice toward any individual, including appellant, and only laid before their readers a true and accurate account of a matter which obviously had upset most of the public officials of Latah County, Idaho, as well as a large number of its citizens. They believed it was their duty to fairly and impartially lay before the public a report of that meeting. The trial court was convinced that this was their only motive in making the publication.

The appellees respectfully urge that the judgment of the lower court should be affirmed.

Respectfully submitted,

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APPENDIX A

This is the full context of the published articles of May 13, 1953, both of which are attached:

—2—IDAHONIAN -:- Moscow, Wednesday, May 13, 1953

GOOD GOVERNMENT ASSOCIATION FORMED AT PUBLIC MEETING CALLED AT SCHOOL

A faction of the Moscow population, numbering some 175 persons, not satisfied with recent actions which brought an abrupt conclusion of the legal cases involving a Mocow attorney and a University of Idaho student, went on record at a public gathering last night "requesting a grand jury" call to clear away what the group called a "miscarriage of justice."

The gathering at Moscow high school last night was called in protest to the actions growing out of incidents at the Perch a campus restaurant, last December 14, involving Richard Shoup, university student, and Murray Estes, local attorney.

This morning, District Judge McQuade, upon whose order rests a call of a grand jury, said he would recommend to Latah county Prosecuting Attorney Melvin Alsager that a "full and complete investigation be conducted in the Estes Shoup cases even to the point of hiring a qualified investigator." McQuade said he would recommend approval to the county commissioners the use of the prosecutor's contingency fund for financing such an investigation.

"Following such an investigation, should facts warrant the filing of informations in the cases," Judge McQuade said he would then consider "a future course of action, whether it be through the local judicial level or through call of a grand jury."

Judge McQuade, in attendance at last night's session and frequently called upon to answer questions during the so called "free forum," repeated his earlier remarks that "I will not call a grand jury if the basis of the call is on rumor alone because I won't see innocent people hurt."

Lengthy Review

Last night's session opened (following selection of Dean D. S. Jeffers of the university Forestry School as temporary chairman) with a detailed review of the Estes-Shoup cases by Capt. Thomas C. Thomas, commander of the university naval ROTC unit, of which Shoup was a member.

Captain Thomas presented his interpretation of the incidents which began at a party at the Idaho Ad club, at which Estes was present, and continued through the alleged altercation at the Perch and subsequent legal maneuvers which concluded last week with a plea of guilty to a battery charge by Estes, and dismissal of charges by Estes against Shoup charging an attempt to compound a felony.

Thomas reported certain facts and incidents which have never before been told publicly and were not a part of any court record . . . they, if they are true, could change matters considerably."

Only One Side

When asked by Mrs. Helen Howard "if Captain Thomas' facts are true, would you accept that as sufficient evidence for calling of a grand jury?", Judge McQuade answered: "If they are all true and there are no explanatory facts which neutralize them, it would be proper to bring in a grand jury. But the captain has brought in only one side of this case."

McQuade, after complimenting Captain Thomas for his detailed review and its presentation, declared the navy man had put forth only facts which were favorable to his side.

Last night's meeting came about as a result of an earlier refusal by Judge McQuade to call a grand jury to investigate possible evidences of injustices during the four-month course of the Estes-Shoup cases.

During the course of the three-hour session last night, motions from the floor resulted in the following actions:

Four Steps

1. Formation of an organization to be known as the provisional Latah County Good Government association.

2. Authorization of the temporary chairman to appoint committee to poll Latah county residents on the question c whether they want a grand jury impaneled.

3. Selection of a committee, made up of Jeffers, Malcolr Neely, Carman Mell, Moscow; William McCreerey, Kenc rick, and J. O. Broyles, Potlatch, to put forward a slate c officers, draw up an organizational plan and arrange for fu ture meetings.

4. Requested the temporary chairman to inform Judge Mc Quade that it was the desire of the group that a grand jur be called.

It was upon the issuance of the statement by Chairma Jeffers to McQuade revealing the desire of the group tha Judge McQuade repeated his stand that he would "not ca a grand jury on rumor alone."

Both sides of the issue were presented at the session. Th Rev. W. W. Prall, speaking as a "private citizen," urged mo investigation. "Let's find out first, what a grand jury can d To be perfectly frank, all I have heard is rumor and I doul if you can investigate a rumor."

He also explained that he "did not believe that at the mc ment there is anything on which the judge could impanel grand jury."

Needs Evidence

To which Judge McQuade replied: "All the petitions i the world won't find a man guilty. The only thing that mear anything is evidence. I'm not going to call the grand jur I'm not going to take a chance of having people hurt."

In his detailed review of the cases, Captain Thomas sai that shortly after the party at the Idaho Ad club at whic both Estes and J. M. O'Donnell, then county prosecutin attorney, were present, Estes went to the Perch and accoste Shoup. The proprietor of the cafe intervened and police wei summoned.

The first police officer who arrived, Captain Thomas sai allowed Estes to depart "and did not take his pistol from him The second officer, he said, arrived and took Shoup to jai

where he was questioned "for quite a considerable time."

"It was then thoroughly established," Thomas said, "that he was completely innocent, and later Estes admitted that it had been a case of mistaken identity."

After several instances where Shoup had been dissuaded from filing any charges against Estes, a charge was filed soon after Melvin Alsager took office as prosecuting attorney, some four weeks after the incident, Thomas said.

Thomas then made reference to legal maneuvers in which a hearing was set for January 15 at 9 a. m. At 8 a. m. that day, Thomas explained, Alsager notified Judge John K. Borg that he would be ready at 9. Alsager and his witnesses were present at police court, normally the place where such hearings are held. But the judge and Estes, Thomas said, had gone to the county courthouse to hear the case.

Ridiculous Situation

"This was a ridiculous situation," said Captain Thomas. A motion for dismissal was made and it was dismissed. "If this had been an honest mistake, it could have been easily rectified by lifting a telephone and telling the prosecutor to bring his witness and come on over."

A second felony charge was filed a few days later but this also was dismissed, Captain Thomas said, on the ground that there was insufficient evidence upon which to bind Estes over.

In the meantime, Captain Thomas explained, the boy (Shoup) was undergoing a strain which was evidenced in bad grades and a possibility he would be expelled from the naval ROTC.

"At the end of January," Thomas continued, "the individual who caused the trouble was scott free and the victim was subject to dismissal from the navy and in danger of losing his chance to become a naval officer. It was simply not right."

Later Shoup's parents came from McKeesport, Pa., and it was agreed then that a simple battery action would be brought against Estes. This third charge was filed soon after Easter, Thomas added.

Captain Thomas then charged that Probate Judge Lloy Martinson had attempted to hold a "quiet, closed trial." A sager was told to bring in the boy and no other witnesse Thomas said. The prosecutor at first agreed and "then whe he realized what was happening, he properly refused to g along with it."

The next day a charge was filed against Shoup allegin that he had attempted to compound a felony. Thomas sai that this charge could not have stood up in court.

Cites Statement

On April 23, Captain Thomas said McQuade held a co ference in which he dissuaded Thomas from allowing h secretary to take notes. He went on that the following da an article appeared in the Daily Idahonian which quoted Judg McQuade as saying that an agreement had been reached b all principals in the case and that there was no justificatio for calling a grand jury.

Thomas said the story quoted McQuade as saying that a torneys for both sides objected to the expense of a grand ju except as a last resort. Thomas said that was erroneous, tha no such agreement was reached.

On May 5, Thomas continued, there was another effort t hold a quiet trial, but that Alsager again refused, saying public trial had been set for May 6 and that was when h intended to have it.

Estes appeared privately before the judge, pleading guilt to the charge of battery and was fined $100. After Este conviction, the charge against Shoup was dismissed.

"At long last," Captain Thomas said, "we had Shoup freed

But these things, Thomas said, "continue to disturb me"

"1. Failure of the police to arrest Estes.

"2. Failure of the police to take the pistol from Estes.

"3. The extraordinary circumstances in which the fir felony was dismissed.

"4. Circumstances of the dismissal of the second charg against Estes.

"5. The reason for the steps which McQuade took to avoid calling a grand jury."

"What to do about it? There has been no change in the local set up since December. The same faces hold office. The same thing could take place and again we'd go through this same rigamarole. There is no way to get justice or to correct the faults in the administration of justice . . . without a grand jury," Thomas concluded.

It was then that Judge McQuade took the floor to offer rebuttal to the statements made by Captain Thomas and to present his reasons for refusing to call a grand jury.

Others Speak

Following Judge McQuade's dissertation, Chairman Jeffers declared a "free forum" and limited each speaker to three minutes.

Mrs. Bernice Brigham, Genesee, declared "this is not the only case of miscarriage of justice here" and added "it is only an indication of the type of justice Latah county has had for a long time."

Dr. R. E. Hosack, another faculty member, said he had been "disturbed by a feeling of uncertainty on the part of Moscow residents over the way local justice has been handled."

"I am also disturbed when a judge throws cold water in the face of the ancient and honorable institution of the grand jury. I think a grand jury would clear the air."

Clifford I. Dobler, law instructor, said, "I don't teach about grand juries, but last week I got hold of a book called the Idaho Code. I found that 16 grand jurors get $4 a day for every day they meet plus 15 cents a mile traveling money." Thus, he said, a grand jury "would not be so expensive as Judge McQuade had intimated." And, he added, "the only people who could be injured are the guilty parties."

McQuade corrected Dobler by stating that grand jurors now get $6 daily plus 25 cents mileage, which would amount to about $96 daily while in session, in addition to costs necessary to subpoena witnesses.

Cites Example

McQuade made reference to a recent call to southern Idah where he had tried grand juries indictments. In Binghar county, he said, seven men were indicted and not one cor victed. But, he said, that in order to meet their legal ex penses, they had all mortgaged their homes, sold their furnish ings and cars, borrowed on life insurance and from friend and relatives.

"That's what I mean when I say innocent people can b hurt."

Among the other brief comments from the floor was tha made by Alsager who said: "My difficulty with the Estes cas has been mostly with the lower court judges. They seem t be cooperating with the defendant more than with me. I don mean they should side with me, but they should help me ge a case to the right court at the right time."

This morning Mrs. R. E. Hosack gave this statement to th Idahonian:

"As president of the Moscow Council of Church Women I wish to make it clear that the reports in the newspape associating the Council, in my name, with the preliminar arrangements for the public meeting held in the high scho Tuesday evening to discuss the administration of justice i Latah county, were erroneous and misleading. The Mosco Council of Church Women was in no way associated wit the arrangements for this or any other meeting for this pu pose. Any connection which I have had with this matter ha been purely in the capacity of a private citizen."

12 Lewiston (Ida.) Morning Tribune
Wed., May 13, 1953

GRAND JURY DEMANDED

BY LADD HAMILTON
(Tribune Staff Writer)

MOSCOW — The most famous legal case in recent Moscow history, which apparently had simmered down last week, boiled over again Tuesday night amid demands for a grand jury investigation.

About 200 Latah County residents gathered at Moscow High School to protest what one of them termed "a miscarriage of justice" growing out of an incident at a University of Idaho Campus cafe last Dec. 14, involving Richard Shoup, a university student, and Murray Estes, Moscow attorney.

Shoup had charged Estes, after the Dec. 14 affair, with assault with a deadly weapon, and after a long series of legal maneuvers, Estes pleaded guilty last week to a reduced charge of battery and, last week, also, a case which Estes had brought against Shoup, charging an attempt to compound a felony (bribery), was dismissed.

Tuesday night's public meeting came about as the result of an earlier refusal of District Judge Jack McQuade to call a grand jury to investigate possible evidences of injustices during the four-month course of the case.

Among other things, the group:

1. Formed a permanent organization called the Latah County Good Government Association;

2. Agreed that a nominating committee be named to put forward officers, draw up an organizational plan and arrange for further meetings;

3. Authorized D. S. Jeffers, Moscow, chairman of the meeting, to appoint a committee which will poll county residents on the question whether they want a grand jury impaneled;

4. Requested Jeffers to inform McQuade that it was the desire of the group that a grand jury be called.

The meeting opened with a long and detailed review of th Estes-Shoup case by Capt. Thomas C. Thomas, command of the University Naval ROTC unit, of which Shoup was member.

Captain Thomas declared that "I don't like the smell of I don't think we have here in this county now the prop administration of justice."

He said the difficulty involving Estes and Shoup began a party at the downtown Moscow Ad Club which Estes an Maury O'Donnell, who was then prosecuting attorney, bo attended.

Shortly after this party, Captain Thomas said, Estes we to the Perch, a campus restaurant, and there accosted Shou with a pistol. He did not fire the weapon. The propriet of the cafe intervened and called police.

Didn't Take Gun

The first officer who arrived, Captain Thomas said, allowe Estes to depart "and did not take his pistol from him." Th second officer, he said, arrived and took young Shoup to ja where he was interrogated "for quite a considerable time."

"It was then thoroughly established," Thomas said, "that h was completely innocent, and later Estes admitted that it ha been a case of mistaken identity."

Thomas said that Shoup had been dissuaded on numero occasions from filing any charges against Estes. He point out that the first charge was not filed against Estes until abo four weeks after the incident had occurred. It was not file he said, until Melvin Alsager had replaced O'Donnell prosecuting attorney.

"Within an hour after Alsager took office the charge w filed," Thomas said. But he added that subsequent leg maneuvers had made it impossible for the prosecuting attorn to get a trial on that charge. He said that it was brought justice court, scheduled for a hearing at 9 a.m. on the mor ing of Jan. 15. At 8 a.m. that morning, Thomas said, Alsag called the judge and told him that he would be ready at

At 9 a.m., he added, the prosecuting attorney and w nesses and the court reporter appeared at the police cou

normally the place where the hearing would be held. But the judge and Estes had gone in the meantime to the district courtroom to hear the case.

"This was a ridiculous situation," Thomas said.

"Counsel for Estes moved that the case be dismissed and it was. If this had been an honest mistake it could have been easily rectified simply by lifting a telephone and telling the prosecuting attorney to bring his witnesses and come on over."

A second felony charge was filed a few days later, the captain said, but this was also dismissed on the ground that there was insufficient evidence upon which to bind Estes over.

"And in the meantime," the captain added, "what has happened to the boy?"

"The strain of the hearing and other legal rigamarole had gotten him down and at mid-year Shoup did badly at his exams. We would have had to drop him from Naval ROTC for poor grades, but with the full concurrence of President (J. E.) Buchanan, we sent a plea to the Navy Department that he be allowed to remain with us for one more term.

"At the end of January, the individual who caused the trouble was scott free and the victim was subject to dismissal from the Navy and in danger of losing his chance to become a Naval officer. It was simply not right."

Later, he said, Shoup's parents came here from McKeesport, Penn., and it was agreed then that a simple battery action would be brought against Estes. This third charge was filed shortly after Easter.

Captain Thomas said that McQuade had attempted to hold a "quiet, closed trial." Alsager was told to bring in the boy and no other witnesses, Thomas said.

(Continued on Page 5)

GROUP DEMANDS GRAND JURY ON ESTES CASE

(Continued from Page 12)

Alsager had first agreed, but then "when he realized what was happening, he properly refused to go along with it."

The next day a charge was filed against Shoup allegi that he had attempted to compound a felony. Thomas sa this charge was "phoney and false" and could not have sto up in court.

He said that on April 23 McQuade held a conference his chambers and that McQuade had dissuaded Thomas fro allowing his secretary to take notes. Thomas said he request that the court reporter take notes and was again dissuade Nothing came of that conference, Thomas said.

He said that on the following day he saw an article in t Moscow Daily Idahonian which quoted McQuade as sayi that an agreement had been reached by all the principals the case and that there was no justification for calling a gra jury.

He said the story quoted McQuade as saying that attorne for both sides objected to the expense of a grand jury exce as a last resort. Thomas said that was erroneous, that no su agreement was reached.

On May 5, he said, there was another effort to hold a qui trial, but he added that Alsager again refused, saying a publ trial had been set for May 6 and that was when he intend to have it.

Estes appeared privately before the judge, pleaded guil to the charge of battery and was fined $100. After Estes' co viction, the charge against Shoup was dismissed.

"At long last," Captain Thomas said, "we had Shoup freed

But Thomas said these things disturbed him:

"The failure of the police to arrest Estes on Dec. 14 or take away his pistol;

"The extraordinary circumstance of dismissing the first b tery charge while the prosecutor was in the regular cou room and the judge and defendant were in another;

"Circumstances of the dismissal of the second charge agai Estes;

"The reasons for the unusual steps which McQuade to to avoid calling a grand jury . . ."

"What to do about it? There has been no change in the local setup since December. The same faces now hold office. The same thing could take place and again we'd go through this same rigamarole. There is no way to get justice or to correct the faults in the administration of justice in Latah County without a grand jury."

Captain Thomas retired amid heavy applause.

McQuade then declared that Captain Thomas had put forward only the facts which were favorable to his side. And McQuade heatedly denied that he had said what the Moscow newspaper quoted him as saying about the grand jury.

He also denied that he would not allow notes to be taken n his conference with the parties to the case.

He said he had told Thomas it was to be an informal neeting "to get rid of these cases in an orderly manner. It as been my observation that people are reluctant to talk when omeone is making notes. I didn't deem it necessary to have he reporter there.

He also said that Thomas had not pressed him for provi- ion to have notes taken, but had asked him merely "would ou rather I didn't?"

McQuade said, "I repeated throughout the conference that had called it for the purpose of enlisting their aid in ending his farce that was growing like a mountain. I said it will ave a serious effect on the community and the university. s for the grand jury, I hadn't made up my mind."

McQuade said that during this conference he told the attorneys that "I will call the grand jury unless you, Estes, and you, Alsager, stop playing around. I said if you don't do something I'll not only call the grand jury, but I will institute disbarment proceedings against both of you.

"As far as I am concerned, I have not abandoned consid- ration of the grand jury. I carry no banner for any side in is case. But I am afraid of injuring a number of innocent eople as I know is sometimes the case with a grand jury."

At this point Dr. Hugh Burgess of Moscow offered a m tion that the Latah County Good Government group formed. The motion passed 132 for and 8 against after brief discussion.

A motion then was made that Jeffers, as temporary cha man, name a nominating committee to include himself, M com Neely, the Rev. Carman Mell, Moscow minister, W liam McQuary, Kendrick newspaper publisher, and Ji Broyles, Potlatch farmer. This motion carried unanimousl

Hints At Other Cases

Mrs. Bernice Brigham, Genesee, declared that "this is n the only case of miscarriage of justice here" and she add that "it is only an indication of the type of justice Lat County has had for a long time."

Dr. R. E. Hosack, University instructor, said that he h been "disturbed by a feeling of uncertainty on the part Moscow residents over the way local justice has been handle

> *"I am also deeply disturbed when a judge throws cold water in the face of the ancient and honorable institution of the grand jury. Grand juries can take the kind of evidence McQuade said he cannot take. I think a grand jury would clear the air."*

Clifford Dobler, University law teacher, said that "I do teach about grand juries but last week I got hold of a bo called the Idaho Code. I found that 16 grand jurors get fo dollars a day for every day they meet plus 15 cents a mile o way for traveling money." Thus, he said, the grand jury wou not be so expensive as McQuade had intimated.

And he added that "the only people who could be injur are the guilty parties."

McQuade offered a correction. He said that grand jur now get $6 daily plus 25 cents mileage, which would amou to about $96 daily while they were in session.

He said he had just returned from South Idaho, where had observed grand juries in action. In one county, he sa seven men were indicted and not one of them was convicte But he said that in order to meet their legal expenses, th had all mortgaged their homes, borrowed on their life ins

ınce, borrowed from relatives and finally had been given a ım of $13,000 which was gathered by public subscription.

"That's what I mean when I say innocent people can be ıurt."

'Immunity' Cited

Dr. Paul Eke, former University instructor, said "there is ı feeling in this community that people in certain classes are mmune to the law. The best thing for us would be a com-ılete change from top to bottom."

Hosack declared that it would be worth $96 plus expenses o clear the good name of Latah County and he then moved hat a group be appointed to canvass the county on the ques-ion. The motion passed 63 to 35.

The Rev. W. W. Prall, Presbyterian minister, urged further nvestigation. "Let's find out first what a grand jury can do," ıe said. "To be perfectly frank, all I have heard is rumor and doubt if you can investigate a rumor."

Alsager said a grand jury does have greater power than a ɔrosecuting attorney.

"My difficulty with the Estes case," he went on, "has been nostly with the lower court justices, who seem to be coop-rating with the defendant more than with me. I don't mean hey should side with me, but they should help me get a case o the right court at the right time."

Dr. Prall said that "I don't believe that at the moment there s anything on which the judge could impanel a grand jury."

To which McQuade replied, "Dr. Prall has put a finger on it. All the petitions in the world won't find a man guilty. The only thing that means anything is evidence. I'm not going to call the grand jury. I'm not going to take a chance on having people hurt."

Mrs. Helen Howard asked him, "If Captain Thomas' facts re true would you accept that as sufficient evidence for the alling of a grand jury?"

McQuade replied, "If they are all true and there are no xplanatory facts which neutralize them, it would be proper o bring in a grand jury. But the captain has brought in only ne side of this case."

APPENDIX B

Constitution of the State of Idaho, Article 1, Section 8.

"Prosecutions only by indictment or information. — No pe son shall be held to answer for any felony or criminal offen of any grade, unless on presentment or indictment of a gra jury or on information of the public prosecutor, after a co mitment by a magistrate, except in cases of impeachment, cases cognizable by probate courts or by justices of the peac and in cases arising in the militia when in actual service time of war or public danger; provided, that a grand jury m be summoned upon the order of the district court in the ma ner provided by law, and provided further, that after a char has been ignored by a grand jury, no person shall be held answer, or for trial therefor, upon information of the pub prosecutor."

APPENDIX C

In Sweeney vs. Patterson, 128 Fed. (2d) 457, the Circu Court for the District of Columbia said:

"Even if the italicized statements are false, appellant h stated no claim on which relief can be granted. The cas are in conflict, but in our view it is not actionable to publi erroneous and injurious statements of fact and injurious co ment or opinion regarding the political conduct and view public officials, so long as no charge of crime, corruptio gross immorality or gross incompetence is made and no sp cial diamage results. Such a publication is not 'libelous p se.' We need not consider whether it is privileged. App lant might be entitled to relief if he had lost his seat in Co gress, or had lost employment, as a lawyer or otherwise, had been put to expense, or had suffered any other econom injury, by reason of appellees' statements. We do not deci that question, since it is not before us. Appellant alleges such injury.

"Cases which impose liability for erroneous reports of t political conduct of officials reflect the obsolete doctrine th the governed must not criticize their governors. Since Co gress governs the country, all inhabitants, and not merely t constituents of particular members, are vitally concerned

he political conduct and views of every member of Congress. Everyone, including appellees and their readers, has an interest to defend, and any one may find means of defending it. The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors in fact, particularly in regard to a man's mental states and processes, are inevitable. Information and discussion will be discouraged, and the public interest in public knowledge of important facts will be poorly defended, if error subjects its author to a libel suit without even a showing of economic loss. Whatever is added to the field of libel is taken from the field of free debate. If other public interests are thought to outweigh, in respect to some utterances, the public interest in knowledge and debate, they call for legislative changes in public law rather than judicial changes in the law of libel."